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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAUL MEDINA CASTILLO, Defendant and Appellant.	E045334 (Super.Ct.No. SWF022791) OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey J. Prevost, Judge. Affirmed as modified.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Melissa M. Mandel and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Raul Medina Castillo appeals from his conviction of possession of methamphetamine for sale (Health & Saf. Code, § 11378—count 1) and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)—count 2) along with true findings on enhancement allegations that he was personally armed with a firearm in the commission of the offenses (Pen. Code, § 12022, subd. (c)) and had suffered two prior convictions of violating Health and Safety Code section 11379 (Health & Saf. Code, § 11370.2, subd. (c))[1] and one prior prison term conviction (Pen. Code, § 667.5, subd. (b)).

Defendant contends: (1) the evidence was insufficient to support the finding that he was personally armed; (2) the evidence was insufficient to establish that he transported drugs within the meaning of the statute; (3) the trial court erred in its instructions to the jury on the offense of transporting drugs; and (4) the trial court erred in failing to instruct the jury with CALCRIM No. 224 as to how to evaluate circumstantial evidence on issues unrelated to mental state. The People contend that the trial court erred in imposing enhancements under Health and Safety Code section 11370.2, subdivision (c) as to both counts 1 and 2, and the enhancements as to count 1 should be stricken. We agree that

[1] The information alleged the enhancements under Health and Safety Code section 11370.2, subdivision (a). At sentencing, the trial court granted the prosecutor's motion to amend the information to allege the applicable subdivision, Health and Safety Code, section 11370.2, subdivision (c).

defendant's sentence must be modified. We find no other prejudicial error, and in all other respects, we affirm the judgment.

II. FACTS AND PROCEDURAL BACKGROUND

On August 14, 2007, Riverside County Sheriff's Deputy William Stokes pulled over the Geo Prizm that defendant was driving. When Deputy Stokes was walking toward the Prizm, he saw defendant "make several furtive movements towards the passenger side floorboard." Specifically, the deputy saw the driver lean over toward his right and "make some type of motion . . . like he was putting something on the floorboard of the vehicle." In the deputy's experience, such movements usually indicated that contraband was being discarded. Meanwhile, the passenger did not move.

Defendant identified himself to the deputy as Raul Moreno and said he did not have a driver's license on him. Defendant's female passenger also misidentified herself. Defendant denied having anything illegal, and he consented to a search. Deputy Stokes patted defendant down and put him in the back of the patrol car. Defendant was cooperative at all times.

Deputy Stokes searched the Prizm and found a small loaded handgun under a bag of food on the passenger side. The bag was closer to the center console than to the door. It was later determined that the handgun was stolen. No fingerprints were ever taken from it.

Deputy Stokes also found a jewelry box between the driver and passenger seats; the box contained four bindles of suspected methamphetamine. Two more bindles were

found on the passenger side floor in the front and rear. Deputy Stokes field tested the contents of two of the bindles, and the tests were presumptively positive for methamphetamine. The total weight of the bindles was 11.1 grams, a usable quantity. The parties stipulated that the Department of Justice had tested one of the bindles, weighing 3.01 grams, and the substance was determined to be methamphetamine.

Neither defendant nor his passenger appeared to be under the obvious influence of methamphetamine. No paraphernalia associated with the sale or use of methamphetamine were found in the Prizm. Deputy Stokes never determined who owned the Prizm; however, he did learn the Prizm was not stolen.

Officer Mark Hudgens testified about an incident in January 2003, during which the officer had stopped a vehicle with illegally tinted windows weaving within the lane. The driver (defendant), threw something out the window. Officer Hudgens determined the vehicle was stolen and he arrested defendant. In a search incident to arrest, the officer found a baggie of white crystalline substance in the driver's compartment; the baggie, which weighed one gram, tested positive for methamphetamine in a field test. The item defendant had thrown from the window was recovered. That item was a baggie which weighed 7.3 grams and which also tested positive for methamphetamine.

Deputy Marc Cloutier testified as to his expert opinion that defendant had possessed the drugs for sale.

The jury found defendant guilty of possession of methamphetamine for sale (Health & Saf. Code, § 11378) and transportation of methamphetamine (Health & Saf.

Code, § 11379, subd. (a)), and found true enhancement allegations that he was personally armed with a firearm in the commission of the offenses (Pen. Code, § 12022, subd. (c)). The trial court found that defendant had suffered two prior convictions of violating Health and Safety Code section 11379 (Health & Saf. Code, § 11370.2, subd. (c)) and one prior prison term conviction (Pen. Code, § 667.5, subd. (b)).

The trial court sentenced defendant to three years on count two and imposed a consecutive term of four years for the arming enhancement, a consecutive term of three years for each of the two Health and Safety Code section 11370.2, subdivision (c) enhancements, and a consecutive term of one year for the prison prior. The trial court stayed punishment on count 1 and its enhancements under Penal Code section 654.

III. DISCUSSION

A. Sufficiency of Evidence that Defendant Was Personally Armed.

Defendant contends the evidence was insufficient to support the finding that he was personally armed within the meaning of Penal Code section 12022, subdivision (c).

1. Standard of Review

When a criminal defendant challenges the sufficiency of the evidence to support his conviction, this court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) We presume in support of

the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence (*id.* at p. 576), and we do not substitute our judgment for that of the jury. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) The same principles apply when the conviction rests solely or primarily on circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

2. Analysis

For purposes of Penal Code section 12022, the term "personally armed" means that the principal in the drug offense either had the firearm on his person or had it available for offensive or defensive use. (*People v. Bland* (1995) 10 Cal.4th 991, 999.) "Available" to a defendant means it can be used, can be "got," or reached, handy, or accessible. (*People v. Balbuena* (1992) 11 Cal.App.4th 1136, 1139, disapproved on another ground in *People v. Bland*, *supra*, at p. 1001, fn. 4.)

When Deputy Stokes was walking toward defendant's car, he saw defendant leaning over to his right with his right arm going toward the passenger floorboard as if he were placing something there. After defendant consented to a search, Deputy Stokes found a loaded handgun on the floor of the passenger side of the car under a bag of food. The jury could reasonably infer from that evidence that defendant placed the gun under the bag of food or placed the bag over the gun to conceal it.

Defendant argues that the handgun was not likely his because he had a female passenger, and the gun was "a derringer, a very small .22[-]caliber handgun that is

generally known to be favored by women."[2] However, Deputy Cloutier testified that drug dealers frequently carry guns to protect themselves and their livelihood. He testified that drug dealers usually do not pick a specific kind of gun because they often have prior felony convictions that preclude their shopping around and require them to buy whatever is available. He further testified that some prefer "big showy guns," while "[s]ome guys want a gun they can hide."

Viewing all the evidence in the light most favorable to the judgment, as we must, (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1138) we conclude ample evidence supports the true findings on the armed enhancements.

B. Sufficiency of Evidence of Transportation of Drugs

Defendant contends the evidence was insufficient to establish that he transported the drugs within the meaning of Health and Safety Code section 11379. He argues that to establish that offense, the People must show that he took drugs from one specific place with the intention of moving them to another specific place, and merely being found in possession of the drug while in a moving car was insufficient. Thus, defendant argues, in essence, that Health and Safety Code section 11379 is not violated if a person merely stores drugs in his vehicle, even if the vehicle is driven from place to place.

Health and Safety Code section 11379, subdivision (a) states that "every person who transports, . . . any controlled substance . . . shall be punished by imprisonment in

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[2] No evidence was introduced to show that such a handgun was "favored by women," and such evidence, if proffered, would likely have been ruled inadmissible as irrelevant and as a form of improper character evidence. (Evid. Code, § 1101.)

the state prison . . . ." In *People v. Rogers* (1971) 5 Cal.3d 129 (*Rogers I*), the defendant was driving several passengers in his car when he was stopped, and marijuana was found in the car. (*Id.* at pp. 132-133.) The defendant was convicted of transporting marijuana under the statute, similar to Health and Safety Code section 11379, which applies to marijuana, but he was acquitted of possession of the marijuana. The court upheld the defendant's conviction of transportation, holding that possession was not an element of that offense. (*Rogers I,* at p. 131.) The court also held it was not necessary to prove the defendant was transporting the drugs for purposes of sale or distribution rather than for personal use. (*Id.* at pp. 134-137.)

Later decisions have established that the term "transport," as used in the statute, does not have a technical definition. "'Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character.' [Citation.] 'To transport means to carry or convey from one place to another.' [Citation.] 'The crux of the crime of transporting is movement of the contraband from one place to another.' [Citation.] The term 'transports' as used in the statute is 'commonly understood and of a plain, nontechnical meaning.' [Citation.]" (*People v. LaCross* (2001) 91 Cal.App.4th 182, 185 [holding that the statute may be violated by carrying drugs on a bicycle].) (See also *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682-685 (*Ormiston*) [holding that the statute may be violated by carrying drugs on one's person while walking through a hotel parking lot].)

Moreover, the statute does not require that the length of travel exceed some minimum. (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1315-1316 (*Emmal*).) In that case, the evidence was held sufficient to establish transportation when the defendant drove his car 20 feet across a parking lot. (*Id.* at p. 1318.) In reaching that holding, the court reviewed the policies underlying Health and Safety Code section 11379: "The Legislature has determined transportation of controlled substances—no matter what quantity is involved—should be prohibited because it poses greater *risks* to the public than simple possession does. As our Supreme Court has observed, the increased penalty provided for transportation is intended to discourage sales and purchases; to reduce the incidents of traffic accidents caused by those who might use and be impaired by a controlled substance during its transportation; and to inhibit the use of controlled substances in general by making it difficult to distribute and obtain them. ([*Rogers I*], *supra*, 5 Cal.3d at pp. 136-137.) The proscription and the penalty that goes with it do not require an *actual* sale, an impaired driver, or even use of the drug before they come into play. It is enough that those evils, along with their attendant risks, have been reasonably associated with the prohibited deed. [Citation.]" (*Emmal*, *supra*, at p. 1316-1317.)

The court in *Emmal* noted that no developments in the law since *Rogers I* have "'undercut the policy basis of the decision—that the transportation of contraband, even if possessed only for personal use, is properly punished more severely than simple possession because the act of transportation substantially increases the risks to the public. [Citation.] . . . We accept the continued vitality of [that] holding . . . and the fact that the

jury found appellant not guilty of possessing methamphetamine *for sale* is not relevant.' We perceive no authority, or reason, to alter that analysis here." (*Emmal, supra*, 68 Cal.App.4th at p. 1317.) The court therefore held that "to satisfy the element of 'transportation' required by Health and Safety Code section 11379, the evidence need only show that the vehicle was moved while under the defendant's control." (*Emmal, supra,* at p. 1318.)

For his contrary argument, defendant relies primarily on Justice Mosk's dissent in *Rogers I* and asserts that "Justice Mosk's interpretation of the statute states the correct rule that liability for transporting excludes cases where someone is carrying around his or her own drugs for personal use." Here, however, defendant was convicted of possession of methamphetamine for *sale*. Thus, even if Justice Mosk's view prevailed, it would be inapplicable under the facts of this case. In any event, the dissent in *Rogers I* is not controlling; we are bound by the majority opinion in that case. *(Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Finally, the views set forth in the majority opinion have consistently been accepted as having "'continued vitality'" (see *Emmal, supra,* 68 Cal.App.4th at p. 1317; see also *Ormiston, supra,* 105 Cal.App.4th at p. 683), and defendant has failed to persuade us that *Rogers I* was wrongly decided.

Defendant further contends *Ormiston* supports his position because that court stated that the statute requires "volitional transport of methamphetamine from *one location to another . . . .*" (*Ormiston, supra,* 105 Cal.App.4th at p. 684.) However, the court went on to say that such a requirement "avoids any unwarranted extension of the

statute to restrained minimal movement *within a residence or other confined area* that does not facilitate trafficking, distribution or personal use of drugs." (*Ibid.*; italics added) Defendant was not moving drugs "within a residence or other confined area." (*Ibid.*) Thus, *Ormiston* is unhelpful to his position.

C. Instructions to Jury on Transportation of Drugs

Defendant contends the trial court erred in its instructions to the jury on the offense of transporting drugs.

The trial court instructed the jury as to the elements of the offense of transportation of a controlled substance: "First, the defendant transported a controlled substance; [¶] Secondly, the defendant knew of its presence; [¶] Thirdly, the defendant knew of the substance's nature or character as a controlled substance; [¶] Fourth, the controlled substance was methamphetamine; [¶] And [¶] Fifth, the controlled substance was in a usable amount. [¶] A person transports something if he or she carries it or moves it from one location to another, even if the distance is short."

Defendant argues, however, that the trial court should have instructed the jury with his interpretation of Health and Safety Code section 11379 as requiring that the defendant have a specific destination. In our discussion above regarding the sufficiency of the evidence, we rejected that interpretation of the statute. Having done so, we further conclude that the trial court's instruction to the jury properly set forth the elements of the offense, and there was no instructional error.

D. Instructions on Circumstantial Evidence

Defendant contends the trial court erred in failing to instruct the jury with CALCRIM No. 224 as to how to evaluate circumstantial evidence on issues unrelated to mental state. The trial court instructed the jury with CALCRIM No. 223, which defines direct and circumstantial evidence, and with CALCRIM No. 225, as to how to evaluate circumstantial evidence of mental states.

1. Standard of Review

"'In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instructions in a manner that violated the defendant's rights.' [Citation.] We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. [Citation.] The absence of an essential element from one instruction may be cured by another instruction or the instructions taken as a whole. [Citation.] Further, in examining the entire charge we assume that jurors are '"""intelligent persons and capable of understanding and correlating all jury instructions which are given."""' [Citation.]" (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.)

2. Forfeiture

The People contend that defendant forfeited his claim of instructional error because his trial counsel impliedly consented to the trial court's proposed instructions.

However, under Penal Code section 1259, we must consider challenges to instructions "'even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.'" (See *People v. Stitely* (2005) 35 Cal.4th 514, 556, fn. 20.) We will therefore consider the issue on the merits.

3. Analysis

In *People v. Rogers* (2006) 39 Cal.4th 826 (*Rogers II*), the defendant contended the trial court had erred by failing to instruct the jury with CALJIC No. 2.01 (which is substantially similar to CALCRIM No. 224) as to the sufficiency of circumstantial evidence even though the trial court had instructed the jury with CALJIC No. 2.02 (which is substantially similar to CALCRIM No. 225) as to the sufficiency of circumstantial evidence of specific intent or mental state. (*Rogers II*, *supra*, at p. 885.)[3] The court held, "An instruction on the principles contained in CALJIC No. 2.01 'must be given sua sponte when the prosecution substantially relies on circumstantial evidence to prove guilt. [Citations.] 'The instruction should not be given "when the problem of inferring guilt from a pattern of incriminating circumstances is not present."' [Citation.]" (*Id.* at p. 885.) The court found error because the prosecution's case as to the identity of one victim's killer rested principally on circumstantial evidence. (*Ibid.*) However, the court rejected the defendant's argument that the error was of constitutional dimensions (*id.* at

[3] Although defendant relied primarily on *Rogers II*, the People fail to discuss that case and instead argue, contrary to the holding of that case, that either CALCRIM No. 224 or CALCRIM No. 225, but not both, should be given when a case involves circumstantial evidence.

pp. 886-887) and found the error harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836.) (*Rogers II*, *supra*, at p. 886.) The court explained that because CALJIC No. 2.02 had been given, the failure to give CALJIC No. 2.01 could have affected only the issue of identity, and on that issue, the evidence "while circumstantial, was strong." (*Rogers II*, *supra*, at p. 886.)

Here, assuming for purposes of argument that the trial court erred in failing to instruct with CALCRIM No. 224, we find the error harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) It was undisputed that a handgun was found on the passenger side floor, and six bindles of methamphetamine were found in the car—four in a jewelry box between the driver and passenger seats and two on the floor in the front and rear on the passenger side. Although defendant was not the owner of the Prizm, it would not have been reasonable for the jury to infer that the contraband belonged to the Prizm's unidentified owner and that defendant was unaware of its presence because there was no reasonable likelihood the owner had lent the Prizm to defendant containing contraband. The fact that defendant had a passenger with him in the Prizm was also unavailing—as the jury was instructed, two people may simultaneously be in possession of the same property. (See *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 526.) Thus, to find defendant not guilty, the jury would have had to find that only the passenger was aware of the presence of the drugs and firearm. However, Deputy Stokes saw defendant reach toward the passenger side of the car several times while the deputy was approaching the

car after stopping it, while the passenger made no movements. The evidence against defendant, even if circumstantial, was compelling.

Moreover, in explaining circumstantial evidence, the prosecutor argued to the jury, "[I]f you have two reasonable conclusions, as what People's evidence shows, and the defense argues are both reasonable, one points to guilt; one points to innocence, then you must adopt the one that points to innocence. [¶] And what this also says, that if there is only one reasonable interpretation of this evidence . . . and that point to guilt—and the argument that points to innocence is unreasonable, it's not reasonable—you must vote guilty. That's what circumstantial evidence is." Similarly, defense counsel argued to the jury, concerning the circumstantial evidence instruction, "if there are two inferences that can be drawn—so for—if there are two ways you can interpret the evidence and one points to guilt and one points to innocence, you don't have a choice if you follow the law. You have to choose the one that points to innocence, even if you don't like it. Even if you'd prefer to pick the guilty one. So long as . . . they are both reasonable, that they are both within the realm of possibilities, real human possibilities, you must pick the one that points to innocence." Thus, the jury heard multiple times the standard by which it was required to assess circumstantial evidence. The error, if any, was harmless.

E. Health and Safety Code Section 11370.2, Subdivision (c), Enhancements.

The trial court imposed two consecutive enhancements under Health and Safety Code section 11370.2, subdivision (c) as to count 2, the principal term, and imposed two enhancements under the same section as to count 1, but stayed the sentence, including

enhancements, on that count under Penal Code section 654. The People request this court to modify the sentence to strike the Health and Safety Code section 11370.2, subdivision (c) enhancements as to count 1.

An enhancement under Health and Safety Code section 11370.2, subdivision (c) is a status enhancement which may be imposed only once in a determinate sentencing proceeding. (*People v. Williams* (2004) 34 Cal.4th 397, 402.) The trial court imposed the enhancements as to both counts 1 and 2, and we agree with the People that the enhancements as to count 1 should be stricken. (See *People v. Tillotson* (2007) 157 Cal.App.4th 517, 524.)

The People also contend that by striking the enhancements as to count 1, defendant's aggregate sentence would be 11 years instead of 14 years. The People's argument overlooks the fact that *two* Health and Safety Code section 11370.2, subdivision (c) enhancements were imposed as to each count, because the trial court found true that defendant had suffered two prior convictions for violations of Health and Safety Code section 11379. Health and Safety Code section 11370.2, subdivision (c) provides for a "full, separate, and consecutive three-year term for *each* prior felony conviction" of a listed felony, including Health and Safety Code section 11379. (Italics added.) Thus, the trial court properly imposed two consecutive enhancements as to count 2, and striking the enhancements as to count 1 will not affect defendant's overall sentence because the enhancements as to count 1 were already stayed under Penal Code section 654.

IV. DISPOSITION

The trial court is directed to strike the Health and Safety Code section 11370.2, subdivision (c) enhancements as to count 1, issue a new abstract of judgment reflecting that modification, and forward a corrected copy of the abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.